E. L. Wagner Company, Inc. *and* Local Union No. 146, Laborers International Union of North America, AFL–CIO. Case 39–CA–3510

April 18, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On August 3, 1990, Administrative Law Judge Joel P. Biblowitz issued the attached supplemental decision. The General Counsel filed exceptions and a brief, and the Respondent filed exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Supplemental Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Supplemental Order of the administrative law judge and orders that the Respondent, E. L. Wagner Company, Inc., Bridgeport, Connecticut, its officers, agents, successors, and assigns, shall pay to the specified funds the amounts set forth (on behalf of the named employees), plus any additional amounts computed in accordance with the procedure set forth in *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979).

[1] The parties have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The General Counsel excepts to the judge's recommendation that interest on this backpay award be computed in accordance with *Flordia Steel Corp*., 231 NLRB 651 (1977), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We find merit to this exception.

We shall modify the supplemental order to require the Respondent to pay additional amounts on the specified fund contributions in accordance with the procedure set forth in *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979).

Michael A. Marcionese, Esq., for the General Counsel.
Robert E. Jackson, Esq. (Siegel, O'Connor, Schiff, Zangari & Kainen, P. C.), for the Respondent.
Robert M. Chevrie, Esq. (Ashcraft & Gerel), for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me in Hartford, Connecticut, on March 21 and April 13, 1990. This supplemental proceeding was initiated by a compliance specification and notice of hearing, which issued on August 31, 1989. Respondent filed an amended answer to the specification on November 3, 1989.

In the underlying case, on May 31, 1989, the National Labor Relations Board (the Board) (at 294 NLRB 493) found that E. L. Wagner Company, Inc. (Respondent), violated Section 8(a)(1) and (5) of the Act by failing to make the contractually required benefit fund contributions for employees who were not members of Local Union No. 146, Laborers International Union of North America, AFL–CIO (the Union), for the period from December 8, 1986, to May 31, 1987,[1] the date the contract and their 8(f) bargaining relationship ended. The Board also found that Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union on April 30, 1 month before the contract expired, but that finding is not relevant to the determinations. In its Order, the Board states that Respondent shall:

> (a) Make whole unit employees by making all fringe benefit contributions, as provided in the applicable collective-bargaining agreement, which were not paid from December 8, 1986, to May 31, 1987, and which would have been paid in the absence of the Respondent's unilateral discontinuance of contributions, and by reimbursing unit employees for any expenses ensuing from the Respondent's failure to make those contributions.

Thus, the period in question is from December 8, 1986, through May 31. The funds[2] alleged to be involved, and admitted by Respondent, together with the hourly contributions, are as follows:

Health Fund	$1.15 an hour
Pension Fund	$1.50 an hour
Training Fund	$ .20 an hour
Legal Services Fund	$ .05 an hour
Annuity Funds	$ .30 an hour

The sole issue is who Respondent must make these payments for, i.e., what nonunion employees did it employ between December 8, 1986, and May 31 who were laborers. The specification (as amended) lists the following as laborer employees of Respondent during this period and, therefore, employees on behalf of whom it had to make the required payments to the Union:

D. Escaleira	H. Costa
Mario Granata	J. Ruggiero
Luis Munoz	T. Underhill
Albino Pinto	Matthew Cuccaro
John Portela	Freddy Feldman
John Biasetti	Joseph Reda

Respondent admits that pursuant to the Board's Decision and Order, it is obligated to make these payments on behalf of the first five individuals named above; however, Respondent denies that the remaining seven individuals were laborers whom it employed during the period, and therefore denies

[1] Unless indicated otherwise, all dates referred to relate to the year 1987.

[2] Annuity fund payments were not required until May 4, so they are due only for the period May 4 through 31.

that it is obligated to make these payments to the Union on their behalf.

Facts and Analysis

The contract involved was between Connecticut Construction Industries, Inc. (CCIA), and Connecticut Laborers' District Council of the Laborer International Union of North America, (the District Council), effective April 1, 1984, through May 31. This shall be referred to as the Agreement. The Agreement states that the District Council is acting for, and on behalf of, a number of its affiliated locals, including the Union. The briefs of counsel for General Counsel and counsel for the Charging Party argue that the Agreement supports their contention that the seven employees were laborers during the period in question. The Agreement defines the work of unit employees in a few places: the first is subdivision A entitled: ''Heavy and Highway Construction Industries,'' which begins: ''The terms of this Subdivision shall apply to the following work when performed in connection with the Heavy and Highway Construction Industries.'' The Agreement then lists about one page worth of operations, none of which can be analogized to Respondent's operation. However, this subdivision does state: ''and further including all types of work as defined in the Laborers jurisdiction as set forth in Appendix A.'' A few pages later, the Agreement contains a subdivision B entitled: ''Tunnels and Shafts in Free or Compressed Air,'' stating: ''The provisions of Subdivision B . . . shall apply to all work performed in the construction of both tunnels and shafts. . . .'' This, also, would clearly not encompass Respondent's work.[3] More to the point, the Agreement contains an eight-page Appendix A entitled: ''Incorporated by Reference.'' This appendix begins: ''Craft jurisdictional claims of the Laborers International Union of North America define the work as set forth, and shall be assigned and performed by members of the bargaining unit.'' Included in Appendix A is the following: Under the caption: ''Concrete, Bituminous Concrete and Aggregates,'' the Agreement states, inter alia:

> Mixing, handling, conveying, pouring vibrating, gunniting and otherwise placing concrete or aggregates, whether done by hand or other process . . . Placing of concrete or aggregates, whether poured, pumped, gunnited, or placed by any other process. The assembly, uncoupling of all connections and parts of or to equipment used in mixing or conveying concrete, aggregates or mortar, including concrete pumping machines and the handling of all pipes and hoses attached thereto.

Toward the end of this appendix, it states ''General Excavation and Grading: The clearing, excavating, filling, backfilling, grading and landscaping of all sites for all purposes and all labor connected therewith.'' The next to final paragraph of this appendix states: ''Use of tools: Operation of all hand, pneumatic, electric, motor, combustion or air-driven tools or equipment necessary for the performance of work described herein.''

[3] It is not surprising that the Agreement was not ''tailormade'' to Respondent's operation as Respondent and the Union did not negotiate their contracts, historically. Rather, Respondent has simply executed acceptance agreements agreeing to be bound by the Union's contract with the CCIA.

The decision of the administrative law judge and the Decision and Order of the Board is of little assistance in determining the work performed by Respondent's laborers; that was not an issue in the underlying matter and, in fact, these decisions never discuss any other classifications of employees employed by Respondent. However, the decision of the administrative law judge does specifically state that Underhill and Biasetti were among the 14 named individuals Respondent rehired for the new season and that Respondent did not make contributions to the Union on their behalf, or on behalf of 4 other named employees.

On May 22, Respondent filed an election petition with the Board regarding its laborer employees, with a supporting affidavit of Respondent's president, John Gedney. The affidavit states, inter alia:

> 8. From a total of sixteen laborers currently employed by E. L. Wagner Co., Inc.., nine laborer employees do not belong to the Laborers' Union. (A copy of the current list of E. L. Wagner Co., Inc., laborer employees is attached hereto as Exhibit 3). This list identifies the Union and non-Union members.
>
> Laborers' Payroll as of 5/21/87:

Laborers (Union)	*Laborers (Nonunion)*
Manuel Cerqueira	John Portella
Frank Cerra	Joseph Reda
Anthony Colacicco	Ted Underhill
Thomas George	John Biasetti
M. Granata (retired)	Matthew Cuccaro
Ilidio Teixeira	Dominick Escaleira
Jose Teixeira	Fredy Feldman
	Luis Munoz
	Albino Pinto

In addition, at the hearing in the underlying matter in January 1988, Gedney was shown Respondent's payroll records, for the period December 1986 through April, for its laborer employees who were not members of the Union and testified as follows:

> Q. Looking through that, were there employees on your payroll working as laborers from December, 1986 through April 30th, 1987, who were not union members on that payroll list?
>
> A. Yes.
>
> Q. Okay. Could you identify them as you go through that?
>
> A. John Biasetti, Ted Underhill, D. Eacalpira, A. Pinto, L. Munoz, John—
>
> Q. Just going through April 30th of 1987. Not after that. But there were others after that date as well? Employed after that date?
>
> A. After what date?
>
> Q. April 30th of 1987?
>
> A. Did I have employees after that? Yes.
>
> Q. But at least those that you named previously, they were there during the period from December, 1986 through April 30th, 1987; correct?
>
> A. Yes.
>
> Q. And you made no contributions to the Union health and welfare, pension, legal services funds or any

other fringe benefit funds on behalf of those employees?

A. To the best of my recollection; no.

Q. And the sole reason why no contributions were made on their behalf is because they are not members of the Union?

A. That is correct.

Q. Now, it was your testimony that these employees were all employed as laborers. What were they doing? Were they working on construction of swimming pools?

A. That is correct.

At the hearing, Gedney testified differently as to the employees in dispute. He testified that, over a long period of time, any employees hired by Respondent to perform manual work, or who worked in the field, was termed a laborer and listed in that manner on its payroll. He testified: ''I looked at it as a generic category, they were just termed laborers and have always been termed that way. . . . Everybody that worked in the construction area we assumed were laborers. We just referred to them as laborers.'' At one time, Respondent had collective-bargaining agreements with the Bricklayers and Masons Union covering its masons; during that period some of its manual employees were classified as masons, in addition to the laborer classification. However, shortly thereafter, in answer to a question of counsel for General Counsel, Gedney testified that during the period in question here, he had a contract with the Bricklayers and Masons Union and made contributions to the union for his employees classified as masons. Admittedly, he had contracts with no other union during the period in question. Gedney testified that the real work of laborers in his operation is excavation work on the pool, hand grading, steel work, and form work, and the seven individuals here in dispute did not perform that work. Gedney also testified that the difference between a laborer's work and a mason's work is that a mason's work is highly skilled, requiring a knowledge of concrete, and how to apply it, as well as stonework. Only his masons do cement finishing, as well as coping and tiling of, and around the pool. He also testified that Reda was Respondent's truckdriver who drove its heavy rack truck; to his knowledge, no laborer ever drove that truck.

Anthony Barbero, the Union's business manager, testified that for many of his 17 years with the Union he has observed Respondent's operation by visiting the jobsites. He observed the laborers on these jobs: ''They basically did everything. They were multicraft type of company where they all intermingled and did every aspect of building a pool.'' He has observed Respondent's laborers driving Respondent's trucks, including the rack truck. They drive them from the yard to the jobsite and between jobsites. He has also observed Respondent's laborers operating a bobcat (an earth moving vehicle) although, with other employers, this machine is operated by Operating Engineers.

Respondent constructs gunnite pools: this is the concrete ''shell'' of the pool. Unlike street paving where concrete is poured out of a truck, gunnite is ''shot'' out of a hose (attached to a truck) to the sides and bottom of the pool at which time it is shaped or smoothed by members of the crew. Gedney testified that Biasetti ran this crew and held the hose, which is a mason's job—''a skilled job, a highly skilled job.'' Laborers are on the gunnite crew, but they do not shoot the gunnite. Barbero testified that the gunnite operation is within the Union's jurisdiction and he has observed Respondent's laborers performing this work.

Biasetti began working for Respondent in about 1967; about 12 years later, he left Respondent's employ, returning in 1986. He was employed there at the time of the hearing. He testified: ''Well, a mason does mason work. You can't get a laborer to do . . . mason work because most laborers don't know how to do it . . . it takes experience and time . . . to learn or to be a mason. A laborer, you can grab anybody and do it.'' He testified: ''When you're a laborer, there is nothing specific. You just labor. They tell you to pick up a plank, you pick up a plank. If they tell you to dig a ditch, you dig a ditch. . . . Whatever they tell you to do, you do it.'' Masons build sidewalks, put down flagstone, coping stone and tile; laborers do ''labor work,'' like mixing cement. Respondent's laborers do not operate the bobcat, ''because it takes a certain skill to operate.'' Reda (and, occasionally Underhill) operate Respondent's bobcat and he has never observed one of Respondent's laborers operating it. Reda also drove Respondent's large rack truck; laborers couldn't drive that truck because it requires a special license. However, laborers have driven Respondent's smaller trucks.

The other witness at this proceeding was Theodore Underhill, who was employed by Respondent until the spring of 1987. He testified that Respondent's laborers drive its rack trucks and vans. He testified that laborers ''assist''; for example, his job, principally, was to shoot the gunnite—''You got a guy that would have to be behind me dragging hose. You got other guys . . . spreading the concrete, cutting it.'' Laborers also assist others in putting in tile; in doing everything from mixing the mortars, to carrying the tiles and setting them up.

John Biasetti

As stated, supra, Biasetti worked for Respondent from about 1967 to 1979, and returned to Respondent's employ in 1986. During the first period, he was a laborer who, among other things, was on the gunnite crew; when Gedney rehired him in 1986, he told him that it would be strictly for mason work. Since returning, ''I was strictly a mason.'' He performed tile work, stone and concrete work, and finishing work. He also shoots the gunnite—''It's not something that you just pick up and do. It takes many years of experience and you have to be qualified to do that.'' The gunnite crew contains five or six men; three masons and three laborers who carry planks and dig ditches. Gedney testified that when he rehired Biasetti in 1986, he hired him specifically to ''run'' the gunnite crew and do the gunnite work on all their pools. He was given the title—gunnite foreman. Due to his ability as a gunnite man and a mason, he was paid $20 an hour—''Well above everybody else.'' When not doing gunnite work, he was performing masonry jobs, such as finishing decks and putting tile and coping around pools. He was ''strictly a mason.'' As stated, supra, Gedney's affidavit and his testimony at the underlying hearing lists Biasetti as a laborer.

There is also an issue of whether Biasetti is a supervisor within the meaning of the Act. As stated, supra, he was rehired in 1986 as the gunnite foreman ''to run the crew.'' He was paid hourly, at the highest rate—$20 an hour. Gedney

testified that he (Gedney) did the hiring for Respondent, but Biasetti could have brought somebody who was looking for a job to meet with him, but Gedney made the decision whether to hire him. Gedney answered the following questions from counsel for Respondent:

> Q. You mentioned, Mr. Biasetti would bring to you people he wanted to hire?
>
> A. Yes; he's done that.
>
> Q. Would he effectively recommend the hiring of these people?
>
> A. Yes.
>
> Q. Have you followed his recommendation in the past?
>
> A. Yes
>
> Q. Has Mr. Biasetti ever sent somebody home from the job?
>
> A. Not to my knowledge, but he had that ability to do it.
>
> Q. Did he have the authority to send somebody home, in your absence, from a job?
>
> A. Sure.
>
> Q. If somebody had to leave the job, for whatever reason, did he have authority to let them go?
>
> A. Yes.

Gedney testified that he visits Respondent's worksites everyday; Respondent has a number of worksites at any given time during its construction season, and it is not clear from Gedney's testimony whether he visits *every* site every day. Biasetti testified that he runs the job—''I have control of the men that I have with me. . . . I'm responsible for the job.'' He does not have authority to fire an employee— ''If I have a problem, I just tell the boss.'' He won't send an employee home; rather, if he is having trouble with an employee, he will talk to him first and later tell Gedney of the situation. There is another supervisor—Travis—between him and Gedney. Biasetti reports directly to him. Travis visits the jobsite everyday; Gedney visits the jobsites, but not everyday. His crew contains from 3 to 10 employees; he works ''just like everybody else,'' and, if anybody is having difficulty with the work, he will show him how to do it.

Theodore Underhill

Underhill began his employment with Respondent in 1982 after being sent by the Union. When he commenced employment with Respondent, he worked on the gunnite crew, initially, holding the hose; later, he advanced to spraying the gunnite from the nozzle. In July 1986, he left Respondent's employ after being injured. Later in 1986, he returned to Respondent's employ for 2 months prior to the winter layoff; during this period he was spraying the nozzle on a gunnite crew. He returned in about April, again, spraying the nozzle on the gunnite crew. During his employment at Respondent, he also did some backfilling, jackhammering, and stripping forms, as well as working on the gunnite crew. Underhill was asked (by counsel for the Union) whether laborers did tile work while employed by Respondent. He answered that some laborers did it.

> Q. And do you recall which laborers would put in tile?
>
> A. Well, whatever—we would assist like another guy to help put up tile and stuff like that.
>
> Q. Okay.
>
> A. Like mix the mortar—you know, for the tiles to be put on. You know, carry the tiles around the pool and set them up.

Respondent's records established that it ceased making fund contributions to the Union on Underhill's behalf in June 1985. Like Biasetti, Gedney, in his affidavit and earlier testimony, names Underhill as a laborer.

Gedney testified that Underhill was a finisher on the gunnite crew (something that only he and Biasetti did) which was mason's work and he would occasionally drive the bobcat. Underhill testified that he drove the bobcat for Respondent for about a year in 1985. Biasetti testified that Underhill held the nozzle for the gunnite operation—which he (Biasetti) considers to be mason's work.

Humberto Costa[4]

Respondent's records establish that, at least, through January 1986, Respondent made fund contributions to the Union on behalf of Costa. Gedney testified that Costa was a plumber who did the piping on the pools and the filtration systems, although he did not have a plumber's license; he also testified that laborers sometimes performed plumbing work. Respondent has not had a contract with the Plumbers Union for many years. Biasetti and Underhill each also testified that Costa does the plumbing work on the jobs; Biasetti testified that laborers can't do plumbing jobs.

Joseph Ruggiero

Respondent's payroll records established that Respondent made fund contributions to the Union on Ruggiero's behalf, at least, until January 1986. Gedney testified that Ruggiero (who is no longer employed by Respondent) was a plumber who performed the plumbing work on the pools and filter systems. Ruggiero also did not have a plumber's license. Although laborers might do some plumbing work within the pool, Ruggiero performed plumbing outside the pool and on the filter, which laborers didn't do. Biasetti also testified that Ruggiero was a plumber, who did not perform laborer's work.

Matthew Cuccaro

Cuccaro was one of the employees listed as one of the nonunion laborers in Gedney's affidavit of May 21 in support of Respondent's petition. The only testimony regarding Cuccaro is from Gedney, who testified that Cuccaro's only job is to drive Respondent's heavy rack truck, for which he has a proper license. He has never performed laborer's duties and could not do so because of an asthmatic condition. Although Respondent's payroll records indicate that he performs yard work, he testified that is a ''general term.'' He didn't even load and unload his truck; he would sit in the yard while it was loaded and unloaded. That was the yard work referred to in the payroll records.

[4] Costa, and the employees listed below, did not testify.

Fredy Feldman

Gedney testified that Feldman (who is also listed as a nonunion laborer in Gedney's May 21 affidavit) does masonry repairs on existing pools; this involves repairing cracks in the pools or repairing tiles that may have broken. Feldman also performs tile and coping work on new pool construction. Biasetti testified that Feldman ''was strickly a mason. He did tile, flagstone, coping stone.'' He did not perform laborer's work. Underhill testified that Feldman was a mason who worked on the gunnite crew with him on a couple of occasions doing the same work as he did.

Joseph Reda

Reda was also named as a nonunion laborer in Gedney's May 21 affidavit. Gedney testified that Reda (together with Cuccaro) drove Respondent's large truck (for which he had a license) delivering materials to the job; he did not perform laborer's work. He also drove the bobcat for Respondent. Biasetti testified that Reda was a truckdriver who drove Respondent's large rack truck as well as the bobcat. Reda delivered the bobcat to the jobsite on the large truck and either he or Underhill operated the bobcat. Underhill testified that Reda was a truckdriver and the other employee who operated the bobcat. Prior to 1987, on occasion, he worked with Underhill on a gunnite crew operating the machine that pumps the concrete into the pool.

The backpay period is from December 8, 1986, to May 31, and there is no dispute about that. There is also no dispute as to funds to be contributed to, and the hourly contribution for each. The final undisputed matter is that the following five individuals were employed by Respondent as laborers during the backpay period: D. Escaleira, Mario Granata, Luis Munoz, Albino Pinto, and John Portela. The sole issue to be decided is whether Biasetti, Underhill, Costa, Ruggiero, Cuccaro, Feldman, and Reda were also laborers in their employment with Respondent during the backpay period. A final issue is whether Biasetti was a supervisor within the meaning of the Act during this period.

In *NLRB v. Brown & Root, Inc*., 311 F.2d 447 (8th Cir. 1963), the court stated that ''in a backpay proceeding, the burden is on the General Counsel to show the gross amounts of back pay due. When that has been done, however, the burden is on the employer to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability.'' In *A & T Mfg. Co*., 280 NLRB 916 at 917 (1986), the administrative law judge stated: ''The burden of proving any mitigation of damages is on Respondent herein, and any uncertainty is resolved against the wrongdoer whose conduct made certainty impossible.''

In making the determination, I take into consideration a number of items. Principally, of course, is the prior decision of the administrative law judge and the Decision and Order of the Board as well as the testimony presented at the hearing. Also clearly relevant (on its own, as well as to Gedney's credibility) is Gedney's testimony at the underlying hearing, as well as the affidavit he filed with the Board in support of Respondent's petition. Respondent's remittance reports to the Union's funds are also relevant even though the most recent one is for January 1986. The most difficult question is the relevance of the Agreement to the instant matter. Counsel for the Charging Party, in is brief, uses the Agreement to support his argument that the employees in question are laborers. Counsel for General Counsel, in his brief, initially cites article IX, section 1 to support his argument and then stresses the following words from this article: ''and further including all types of work as defined in the Laborer's Jurisdiction as set forth in Appendix A, incorporated herein by reference and annexed to said Agreement.'' Counsel for Respondent, in his brief, states that the Agreement is not relevant to the instant matter because it never refers to anything close to Respondent's operation—constructing and maintaining private swimming pools. I find that articles IX (subdivision A) and XII (subdivision B) clearly are not relevant to the instant matter as they involve operations totally dissimilar to Respondent's. I also find that the introduction to Appendix A indicates that it was meant to stand on its own as well as applying to industries covered by subdivision A. The terms of this appendix are therefore relevant and will be considered in determining the court classification of the individuals.

Biasetti is, obviously, an extremely competent and trusted employee of Respondent. Both he and Gedney described his work as ''strictly'' mason work. He does tile work, stone and concrete work, and finishing work, as well as holding the hose and shooting the gunnite, which he testified, is ''not something that you just pick up and do.'' For all this, he receives an hourly wage ''well above everybody else.'' On the other hand, the administrative law judge in his decision, named Biasetti as one of the employees (laborers by implication) whom Respondent hired in March; in that hearing (on January 21, 1988) Gedney testified that Biasetti was one of the nonunion laborers employed by Respondent at that time; and, in an affidavit dated May 21, Gedney listed Biasetti as one of his nonunion laborers. I find that Respondent has not satisfied its burden that Biasetti is something other than a laborer. Although Biasetti testified credibly that he performed mason work (tile and stone) he also did a substantial amount of work on the gunnite crew—laborer's work pursuant to the appendix in the Agreement. I find no basis for removing him from this classification simply because he held the nozzle and shot the gunnite. Just as persuasive is the judge's decision naming Biasetti and Gedney's testimony and affidavit naming Biasetti as a laborer. I also find that Biasetti is not a supervisor within the meaning of the Act. He was hired to ''run the crew'' and was paid ''well above'' everybody else. The crew contains from 3 to 10 employees and Biasetti has ''control of the men'' and is ''responsible for the job.'' There is nobody above him present at the jobsite all the time, although Gedney, apparently, visits each jobsite most days and his superior, Travis, visits the jobsites everyday. Biasetti cannot hire on his own, but he has brought individuals to Gedney whom he wanted hired,[5] but Gedney made the final decision. Biasetti cannot fire an employee— ''If I have a problem, I just tell the boss.'' He works ''just like everybody else'' and assists employees in his crew who are having difficulty. As the Board stated in *Feralloy West Co*., 277 NLRB 1083 at 1084 (1985):

[5] I have placed little credence on the following testimony of Gedney because it is unsupported by any specific testimony.

Q. Would he effectively recommend the hiring of these people?

A. Yes.

Q. Have you followed his recommendation in the past?

A. Yes

> It is well established that the possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to confer supervisory status on an employee, provided that authority is exercised with independent judgment on behalf of management and not in a routine manner.

Although Biasetti was an experienced employee and the crew leader, as there is no evidence that he exercised independent discretion on a regular basis, or to any significant degree, I find that he is not a supervisor within the meaning of Section 2(11) of the Act.

During his employment with Respondent during the period in question, Underhill worked on the gunnite crew, as well as backfilling, jackhammering, and stylizing forms. This is laborer's work pursuant to the appendix to the Agreement. In addition, the judge named Underhill as one of the laborers rehired in March, and Gedney named Underhill as a laborer in his May 21 affidavit, as well as his January 21, 1988 testimony; Respondent made contributions to the Union's funds, on Underhill's behalf until June 1985 and there is no evidence of any change in his duties since that date. I therefore find that Underhill was employed by Respondent as a laborer during the period in question.

There is little testimony regarding most of the remaining employees. As regards Costa, Gedney testified that he was a plumber who did the piping on the pools and the filtration system and prepared the plumbing kits for the following year's season. He did not have a plumber's license. Gedney also testified that laborers ''sometimes'' did plumbing work. Biasetti also testified that Costa was a plumber and that ''laborers can't do plumbing job.'' Underhill also testified that Costa was a plumber and that he (Underhill) never performed plumbing work. Gedney, also testified that Ruggiero was a plumber (also without a plumber's license) who performed no laborer's work. He worked principally on the pools' filtration systems and instructed Respondent's customers on its use. Biasetti also testified that Ruggiero was a plumber and he never saw him perform any other kind of work. The only evidence supporting the contention that Costa and Ruggiero were laborers is that they do not possess a plumber's license (Respondent does not have a contract with the Plumbers Union) and that Respondent made fund contributions to the Union on their behalf, at least, until January 1986. It appears to me that only the latter item is significant, but cannot overcome the uncontradicted testimony that they did only plumbing work, work which is distinguishable from laborer's work and is work that was not described in the appendix to the Agreement. I therefore find that Costa and Ruggiero were not laborers during the period in question and that contributions need not be made on their behalf.

The uncontradicted testimony (Gedney's) is that Cuccaro was a truckdriver who drove Respondent's heavy rack truck, for which he had a proper license. He did no other work, not even loading or unloading his truck.[6] The only evidence otherwise is that Cuccaro was one of the employees named as a laborer in Gedney's May 21 affidavit in support of its petition. In this case, I find this is not enough to overcome the uncontradicted evidence that he did not perform laborer's work during the period in question, and was, therefore, not a laborer.

Gedney testified that Feldman principally performed masonry repair work, as well as tile and coping work on new pool construction; Biasetti testified that he was ''strictly a mason.'' Underhill testified that he was a mason who worked with him on the gunnite crew on a couple of occasions. As Feldman was listed as a laborer in Gedney's May 21 affidavit, worked with the gunnite crews, on occasion, and principally did mason *repair* work, I find that he should be classified as a laborer during the period in question.

Gedney testified that Reda was a truckdriver who drove Respondent's large truck, for which he had a license; he also operated Respondent's bobcat. He performed no laborer's work.[7] Biasetti also testified that Reda drove Respondent's large truck and also drove the bobcat to Respondent's jobsite and operated the bobcat, along with Underhill. Underhill also testified that Reda drove the truck and was the other employee who operated the bobcat. Because Reda operated the bobcat, which would be covered by the General Excavation and Grading provision of the appendix to the Agreement, and was listed as a laborer in Gedney's May 21 affidavit, I find that he was a laborer during the period in question, even though he also was a truckdriver for Respondent.

I therefore find that the following employees were laborers employed by Respondent during the period December 8, 1986, through May 31: John Biasetti, Theodore Underhill, Fredy Feldman, Joseph Reda, as well as the uncontested laborers, D. Escaleira, Mario Granata, Luis Munoz, Albino Pinto, and John Portela.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, E. L. Wagner Company, Inc., Bridgeport, Connecticut, its officers, agents, successors, and assigns, shall pay to the funds specified below the amounts set forth (on behalf of the named employees), plus interest computed in accordance with *Florida Steel Corp*., 231 NLRB 651 (1977), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987):

[6] It should be noted that counsel for the Charging Party, in his brief, misstates the record when he alleges that Cuccaro did yard work and loaded and unloaded Respondent's trucks. In this regard, Gedney testified:

> A. Well, usually with Matt for instance, he wasn't able to do anything else. If he drove the truck into the yard and was waiting for it to be loaded, he'd be sitting around waiting for it to be loaded, and therefore we would group that as yard or miscellaneous for him.
>
> Q. Would he load or unload the truck?
>
> A. Matt could do all he could to drive the truck.

[7] Counsel for the Charging Party, in his brief, states that Reda worked on the gunnite crew. The only testimony in that regard is from Underhill who testified that Reda worked with him on the gunnite crew in July 1986 (prior to the period in question) but never worked with him on the gunnite crew when he (Underhill) returned to Respondent's employ in 1987 (the period in question).

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Name	*Qtr./Yr.*	*# Hrs.*	*Health Fund 1.15/Hr.*	*Pension Fund 1.50/Hr.*	*Training Fund .20/Hr.*	*Service Legal Fund .05/Hr.*
J. Biasetti	4/86	115.5	$132.83	$173.25	$23.10	$5.78
	1/87	507.5	583.63	761.25	101.50	25.38
	2/87	464.5	534.18	696.75	92.90	23.23
D. Escaleira	2/87	455.5	523.83	683.25	91.10	22.78
M. Granata	2/87	192.5	221.38	288.75	38.50	9.63
L. Munoz	2/87	286.5	329.48	429.75	57.30	14.33
A. Pinto	2/87	280.0	322.00	420.00	56.00	14.00
J. Portela	2/87	220.0	253.00	330.00	44.00	11.00
T. Underhill	4/86	31.5	36.23	47.25	6.30	1.58
	1/87	33.0	37.95	49.50	6.60	1.65
	2/87	258.5	297.28	387.75	51.70	12.93
F. Feldman	4/86	60.0	69.00	90.00	12.00	3.00
	2/87	263	302.45	394.50	52.60	13.15
J. Reda	4/86	121.5	139.73	182.25	24.30	6.08
	1/87	116.0	133.40	174.00	23.20	5.80
	2/87	428.0	492.20	642.00	85.60	21.40
Total			$4,408.57	$5,750.25	$766.70	$199.77

Name	*Qtr./Yr.*	*# Hrs.*	*Annuity Fund .30/Hr.*
J. Biasetti	2/87	235.0	$70.50
D. Escaleira	2/87	236.0	70.80
M. Granata	2/87	192.5	57.75
L. Munoz	2/87	170.5	51.15
A. Pinto	2/87	163.5	49.05
J. Portela	2/87	220.0	66.00

Name	*Qtr./Yr.*	*# Hrs.*	*Annuity Fund .30/Hr.*
T. Underhill	2/87	81.5	24.45
F. Feldman	2/87	48.0	14.40
J. Reda	2/87	123.5	37.05
Total			$441.15